

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

Case nos: A519/01 and A646/01

In the matters between:

Mei Danster

Appellant

vs

The State

Respondent

and

Spashashe Ngido

Appellant

vs

The State

Respondent

JUDGMENT: DELIVERED ON 8 MARCH 2002

DAVIS J:

Introduction.

On 2 May 2001 the appellant Danster ('Danster') was convicted on a charge of rape and sentenced to a term of ten years' imprisonment. On 15 May 2001 he applied to the magistrate for leave to appeal against his conviction but this was refused.

On 25 June 2001 he filed the following application:

- '(1) Ek het reeds appèl aangeteken ingevolge art 309B & C;
- 2) Aangesien art 309B & C onkonstitusioneel is en die appèlprosedure verander het, dien ek nou weer 'n Kennisgewing van Appèl in'.

On 8 February 2002 the appeal was placed on the roll and for the first time the question of an appeal against sentence was raised. On 30 January 2002 Danster applied for condonation in respect of an amended ground of appeal, that is appeal against sentence.

On 24 November 1998 the appellant, Nqido ('Nqido') and his co-accused were arrested and charged with two counts of robbery in the regional court Cape Town. Nqido and his co-accused pleaded guilty. A plea explanation in terms of section 112 of the Criminal Procedure Act 51 of 1977 ('the Act') was accepted. On the same day Nqido was convicted on the basis of his plea.

On 3 November 1999 he was sentenced to a term of fifteen years imprisonment in terms of section 51(2)(a) of Act 105 of 1997, the court having found that no substantial and compelling circumstances existed to justify the imposition of a lesser sentence.

On 22 November 1999 Nqido filed an application for condonation in respect of appeal against sentence. The magistrate filed an undated notice saying that she had nothing further to add. On 8 February 2002 the appeal was placed on the roll.

S v Steyn

Both these appeals concern the implication of the judgment handed down by the Constitutional Court in **S v Steyn** 2001(1) SA 1146(CC) in terms of which sections 309B & 309C together with certain wording of section 309(1) of the Act were declared invalid. The order of the Constitutional Court dated 29 November 2000 reads as follows:

- '1. Sections 309B and 309C of the Criminal Procedure Act 51 of 1977 are inconsistent with the Constitution and are declared invalid.
2. The words 'subject to s 309B' in s 309(1) of the Criminal Procedure Act 51 of 1977 are inconsistent with the Constitution and are declared invalid.
3. The declarations of invalidity in paras 1 and 2 of this order are suspended for a period of six months from the date of the order.
4. During the period of such suspension, clerks of the court shall, when submitting documents to a High Court in terms of s 309C(3) of the Criminal Procedure Act 51 of 1977, submit copies of the record of proceedings in the magistrate's court and the magistrate's reasons for the judgment appealed against in every case in which –

- a) the applicant for leave to appeal has been –
 - i) sentenced, without the option of a fine, to a prison sentence of which the unsuspended portion is in excess of three months, or
 - ii) given an option of a fine but that fine has remained unpaid for a period of two weeks from the date of sentence and the unsuspended portion of the alternative term of imprisonment is in excess of three months; and
 - b) the applicant for leave to appeal is prosecuting the application for leave in person; and
 - c) there is no automatic review in terms of s 302 of the Criminal Procedure Act 51 of 1977.
5. The Minister of Justice and Constitutional Development may at any time before the expiry of the period of suspension provided for in para 3 above, apply to this Court for an order varying the terms stipulated in para 4 or extending the period of suspension provided for in para 3 or both.’

It is common cause that upon the expiry of the six month period of suspension, being 28 May 2001, the Ministry of Justice did not initiate an amendment to the Act.

The Implications of the Judgment.

Prior to the introduction of section 309B and section 309C which were introduced into the Act in terms of Act 76 of 1997, section 309(1)(a) of the Act provided that an accused could appeal to the High Court having jurisdiction against any conviction, sentence or order imposed by a lower court. In terms of section 309(2) the appeal was required to be

prosecuted in terms of Rule 67 of the Magistrate Courts Rules which provided that such an appeal had to be noted within fifteen days. In terms of a proviso to section 309(2), the High Court, having jurisdiction over the appeal, could extend this period. In the event that the appeal was prosecuted outside of the prescribed time limit, a substantive application for condonation had to be brought before the High Court having such jurisdiction.

In terms of section 309B(1) and (2) (A) as from 29 May 1999, an accused was required to apply to the trial court for leave to appeal against that court's decision within fourteen days. Section 309C, provided that in the event that the lower court refused leave to appeal in terms of s 309B, an accused could petition the Judge President of the High Court having jurisdiction.

Had the Constitutional Court not acted in terms of section 172(1)(b) of the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') and suspended the order of invalidity for a period of six months, such a declaration of invalidity would have taken effect immediately from the date on which the impugned sections had been introduced into the Act, that is from 28 May 1999.

In **Ferreira v Levin NO and Others** 1996(1) SA 984(CC) the court accepted the principle of objective constitutional invalidity in terms of which a law declared to be unconstitutional is considered to be invalid from the date of its enactment. See **Ferreira**, supra at paras 27 - 30, and **National Coalition for Gay and Lesbian Equality v Minister of Justice** 1999(1) SA (CC) at paras 84 – 96.

In recognition of the principle of objective constitutional invalidity, section 172(1) of the Constitution empowers the Constitutional Court to alter the effect of the doctrine. Thus section 172(1)(b) provides that the court may make any order that is just and equitable including

- i) an order limiting the retrospective effect of the declaration of invalidity; and
- ii) an order suspending the declaration of invalidity;

In the context of the present dispute the effect of such an order has been the subject of conflicting decisions in this division. In **Brandt and Others v S** (unreported case no.

P44/2001) **Knoll J (Selikowitz J concurring)** found that the suspension of the invalidity had come to an end on 28 May 2001, that is at the end of the six month period of suspension. Thus sections 309B & 309C of the Act were no longer valid (and had never been valid) and an appellant had (and had always had) a right to appeal in terms of the provisions of the Act, read without the invalid provisions. In other words section 309(1) and section 309(2) of the Act applied in their original form. Thus appeals launched but not completed by 28 May 2001, stand to be governed by ss 309(1) and (2) of the Act.

By contrast in **Jaars & Others v S** (unreported judgment of the Cape Provincial Division case No. A 710/01) **Thring J (Erasmus J concurring)** followed the approach of **Stafford DJP in Xhosa v S** (unreported judgment of the Transvaal Provincial Division: case No. A672/2001 L) and held that sections 309B and C of the Act remained in force until midnight on 28 May 2001, at which moment the declaration of the Constitutional Court became effective. On this basis, appellants who were convicted and sentenced before 29 May 2001 were required to appeal in terms of ss 309B and C.

In my view, the approach adopted by **Knoll J in Brandt, supra** is correct. A suspension of invalidity does not destroy the doctrine of objective invalidity. Were it to do so there would be no point in specifying a time limit for the suspension of an order which declared a provision to be unconstitutional, as an order given in terms of section 172(1) of the Constitution to suspend the declaration of invalidity would then render the doctrine of objective invalidity ineffective. Such an approach runs contrary to the purpose of section 172(1), which is to temper possibly harsh effects of the doctrine of objective invalidity by ensuring that, during a specified period as contained in such order, Parliament would be afforded the opportunity to cure the constitutional defect. In the present case the Ministry of Justice did not prepare any such legislation for Parliament. Accordingly the order of suspension lapses and the doctrine of objective constitutional invalidity dictates that the legislation is rendered unconstitutional from the day from which such legislation became operative.

This finding has the following implications:

1. Completed matters are not affected by the declaration of invalidity. In short, the

following matters can be considered to have been completed:

- 1.1 an application for leave to appeal which has been granted;
- 1.2 an application for leave to appeal which has been refused but the petition to the Judge President has either been successful or was refused before 29 May 2001.
- 1.3 an application for leave to appeal has been refused and the time limit for

petitioning the Judge President had expired before 29 May 2001.

2. Where an application for leave to appeal was launched and refused but a timeous petition was not considered as at 29 May 2001, the petition lapses and the applicant now enjoys an automatic right of appeal. In practice we rule that the application for leave to appeal should in general be considered as the notice of appeal.
3. Where an application for leave to appeal was launched and refused and the time limit for the petition expired after 29 May 2001, the applicant has an automatic right to appeal, irrespective of whether the petition was actually brought. Again, the application for leave can be regarded as the notice of appeal.
4. Where no application for leave to appeal had been launched before 29 May 2001, an applicant would need to apply for condonation for bringing an appeal out of time.

There is the additional difficulty caused by the repeal of Rule 67(1) of the Magistrates' Courts Rules. Rule 67(1) had initially provided that an appeal had to be noted within 15 days. The new Rule which deals with applications for leave to appeal and not with notices of appeal does not refer to any period; the applicable time limit for launching an application for leave to appeal having been prescribed by sec. 309B(1), namely, 14 days.

There is now no period within which such appeal must be noted. Appeals of this nature which are to be brought before the High Court can, as far as proceedings in the High Court are concerned, be properly regulated by an appropriate Court Notice, the details and publication of which fall within the authority of the Judge President. This court has no power to alter the Rules of the Magistrates Court.

Application to Appeals.

It is now possible to return to the examination of the two appeals in question. In the case

of Danster, the suspension of invalidity lapsed while he still had time to petition the Judge President in terms of section 309C of the Act. Accordingly the appeal process had not been completed by the time the suspension of invalidity lapsed. Danster's appeal stands to be considered in terms of section 309(1) and (2); that is, the law as it applied before the introduction of the impugned sections.

In my view, the magistrate correctly found that the complainant had testified in a satisfactory and candid fashion. Her evidence was supported by that of her thirteen year old child who also provided satisfactory testimony. The magistrate correctly rejected as false the denial of the accused that he had no contact with the complainant. There is no basis on which to interfere with the conviction.

Turning to the application for condonation in respect of the appeal against sentence, the question arises as to whether there are any prospects of success in respect of such an appeal. Mr Caiger submitted that the magistrate had not taken account of the personal circumstances of the accused. This is a manifestly incorrect submission, in that the written reasons for sentence contain a fairly detailed analysis of the appellant's personal circumstances. These circumstances include a long list of previous convictions, including a conviction for assault on 30 May 1994 and a further conviction on 8 September 1994 for housebreaking. Given the record of the accused together with the serious nature of the crime of rape, there are no prospects of a successful appeal. Accordingly the application for condonation should be dismissed.

Nqido

In the case of appellant Nqido, the appeal process had not been completed as at 29 May 2001. On 22 November 1999 the appellant filed an application for condonation and leave to appeal against the sentence. For an unexplained reason, nothing occurred until 8 February 2002 when the appeal was placed on the roll. This appeal also stands to be determined in terms of the provisions of s309(1) read without the words 'subject to s 309B'.

As to the merits of the appeal, the court sentenced the appellant on 2 November 1999. The record is unfortunately rather incomplete. It does not, for example, contain the plea explanation of the appellant. It is thus not possible to determine whether the appellant carried any weapon or knew that one of the other accused possessed such a weapon when they boarded the train. For this reason it is not possible to assess whether appellant's crime falls within the scope of s51(2)(a) of Act 105 of 1997 or if it does, to determine, with sufficient exactitude, whether there were substantial and compelling circumstances sufficient to justify a reduction of the prescribed sentence.

There is another difficulty: the appellant and his co-accused was each sentenced to 15 years' imprisonment. There were, however, two charges of robbery, and sentence should have been imposed in respect of each charge. The sentence is incompetent and should be set aside

THE ORDER

For the reasons given I would therefore make the following order:-

1. The appeal of Danster against his conviction is dismissed.
2. The application for condonation in respect of an appeal against sentence by Danster is dismissed.
3. The appeal against sentence by appellant Nqido succeeds and the sentence is set aside. The appeal is referred back to the magistrate in order to impose sentence afresh.

DAVIS J

I agree and it is so ordered

NEL J

I agree

CONRADIE J